Foo Khoon Chin & Ors v Gas Pantai Works Sdn Bhd & Anor

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02–98 OF 2002
TENGKU BAHARUDIN SHAH, ZAINUN ALI AND MOHD HISHAMUDIN JJCA
15 JUNE 2009

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Civil Procedure — Pleadings — Failure to plead defence — Whether failure to plead issue meant appellants could not rely on it

Contract — Breach — Damages — Whether High Court judge erred when he rejected appellants' argument on lack of consideration — Whether High Court judge erred when he failed to consider fact that agreement was revoked — Whether respondents failed to prove their loss

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According to the chairman of Gas Pantai Works Sdn Bhd and Gas Pantai Timur Sdn Bhd ('the respondents'), the respondents had incurred losses due to the activities of Foo Khoon Chin and Shamsudin bin Abu Bakar ('the first and second appellants'), who were at the material time officers of the first respondent company. The chairman of the respondents discovered that the first and second appellants had given credits loosely to customers of the first respondent and had secretly established a company known as GPW Engineering Sdn Bhd ('GPW'), in which the two appellants were directors. When the first respondent discovered the incorporation of GPW, a name that according to the first respondent was deliberately chosen to confuse members of the public by its similarity to the name of the first respondent company, the first and second appellants tendered their resignation as officers of the first respondent. Thereafter the first and second appellants entered into an agreement with the respondents, whereby they agreed, inter alia, to change their company name to another name, which would not be similar to the names of the first and second respondents, and collect all due and outstanding debts (the debts) of the first respondent as listed in the Annex to the agreement. It was also agreed that if the appellants did not collect the debts before 31 December 1990, they would pay the first respondent a sum equivalent to the amount of debt not collected, which would then be assigned by the first respondent to the first and second appellants to collect. The appellants further agreed to pay the respondent the debts and any loss incurred by the first respondent based on the audited accounts of the first respondent as at 31 December 1990, on or before 28 February 1991. When the first and second appellants failed to make the payments as required under the agreement, the respondents commenced the present suit for breach of contract against the first

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and second appellants and PEM Engineering Sdn Bhd ('the third appellant'), formerly known as GPW. The respondents claimed a sum of RM261,454, which they claimed the appellants were legally obliged to pay pursuant to the agreement, in particular cll 3 and 4 thereof. The appellants claimed that there was an absence of written consideration in the agreement between the parties. The High Court judge entered judgment for the respondents and awarded them damages. This was the appellants' appeal against that decision. The appellants' contended that the High Court judge erred when he failed to consider that there was an absence of consideration in the agreement between the appellants and the respondents; and failed to consider the fact that the agreement between the parties was revoked by the two letters issued by the first respondent. The appellants further submitted that the respondents had failed to prove that they had incurred a loss of RM261,454 with interest as claimed in the statement of claim.

Held, dismissing the appeal with costs:

(1) The High Court judge was correct in rejecting the respondents' argument that the agreement lacked consideration because this issue was not pleaded in their statement of defence. It is settled law that a defendant to an action for breach of contract cannot raise the issue of lack of consideration unless he has raised that issue in his statement of defence (see para 15).

(2) The High Court had also dismissed the issue that the first respondent had revoked the agreement on the grounds that this was not pleaded in the statement of defence. It was found that as this issue of revocation was not raised in the appellants' statement of defence the High Court judge was correct in rejecting the respondents' argument on this issue. The vague averment in the statement of defence could not be relied upon by the appellants to contend that the issue of revocation had been pleaded in the statement of defence. In any case after examining the contents of the two letters issued by the first respondent it was found that these did not amount to a revocation of the agreement (see paras 16–17).

(3) The first respondent company had tendered the audited accounts for the years 1988, 1990 and 1991 and its auditor had in his affidavit confirmed that the contents of the said audited accounts were true and fair. The respondents' chairman had also explained how the sum of RM261,454 as claimed was derived. Further the respondents' chairman was never challenged as to the truth and accuracy of the accounts. Thus it was found that the respondents' claim as to their losses was satisfactorily supported by credible documentary evidence (see para 18).

[Bahasa Malaysia summary

Menurut pengerusi Gas Pantai Works Sdn Bhd dan Gas Pantai Timur Sdn Bhd ('responden-responden'), responden-responden telah mengalami kerugian

disebabkan oleh aktiviti Foo Khoon Chin dan Shamsudin bin Abu Bakar ('perayu-perayu pertama dan kedua'), yang pada masa material adalah pegawai syarikat responden pertama. Pengerusi responden-responden mendapati bahawa perayu-perayu pertama dan kedua telah memberikan kredit tanpa kawalan kepada pelanggan responden pertama dan telah secara rahsia menubuhkan syarikat yang dikenali sebagai GPW Engineering Sdn Bhd ('GPW'), di mana kedua-dua perayu adalah pengarah. Apabila responden pertama mengetahui mengenai penubuhan GPW, suatu nama yang menurut responden pertama dipilih dengan sengaja untuk mengelirukan awam dengan keserupaan namanya dengan nama syarikat responden pertama, perayu-perayu pertama dan kedua meletakkan jawatan mereka sebagai pegawai-pegawai responden pertama. Kemudian perayu-perayu pertama dan kedua memasuki perjanjian dengan responden-responden, di mana mereka bersetuju, antara lain, untuk mengubah nama syarikat mereka kepada nama yang lain, yang tidak akan serupa dengan nama-nama responden pertama dan kedua, dan memungut kesemua hutang responden pertama yang masih belum dibayar dan tertunggak ('hutang-hutang tersebut') seperti yang tersenarai di dalam Annex kepada perjanjian tersebut. Juga dipersetujui bahawa jika perayu-perayu tidak mengutip hutang-hutang tersebut sebelum 31 Disember 1990, mereka akan membayar responden pertama jumlah yang sama dengan jumlah hutang yang tidak terkutip, yang kemudian akan diletakhak oleh responden pertama kepada perayu pertama dan kedua untuk dikutip. Perayu-perayu selanjutnya bersetuju untuk membayar responden hutang-hutang tersebut dan apa-apa kerugian yang dialami oleh responden pertama berdasarkan kepada akaun-akaun responden pertama yang diaudit setakat 31 Disember 1990, pada atau sebelum 28 Februari 1991. Apabila perayu pertama dan kedua gagal membuat bayaran seperti yang dikehendaki di bawah perjanjian, responden-responden memulakan guaman ini bagi kemungkiran kontrak terhadap perayu pertama dan kedua dan PEM Engineering Sdn Bhd ('perayu ketiga'), dahulunya dikenali sebagai GPW. Responden-responden memohon jumlah sebanyak RM261,454 yang mereka mendakwa bahawa perayu-perayu bertanggungjawab dari segi undang-undang untuk membayar menurut perjanjian, khususnya klausa 3 dan 4. Perayu-perayu menghujah bahawa tiada balasan bertulis di dalam perjanjian di antara pihak-pihak. Hakim Mahkamah Tinggi memasukkan penghakiman bagi responden-responden dan mengawardkan ganti rugi. Ini adalah rayuan perayu-perayu terhadap keputusan tersebut. Perayu-perayu menghujah bahawa hakim Mahkamah Tinggi terkhilaf apabila dia gagal mempertimbangkan bahawa tidak ada balasan di dalam perjanjian di antara perayu-perayu dan responden-responden; dan gagal mempertimbangkan fakta bahawa perjanjian di antara pihak-pihak terbatal dengan pengeluaran dua surat oleh responden pertama. Perayu-perayu selanjutnya menghujah bahawa responden-responden telah gagal untuk membuktikan bahawa mereka

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mengalami kerugian sebanyak RM261,454 dengan faedah seperti yang dipohon di dalam penyata tuntutan.

Diputuskan, menolak rayuan dengan kos:

(1) Hakim Mahkamah Tinggi betul dalam menolak hujahan responden-responden bahawa perjanjian tersebut tidak ada balasan kerana isu ini tidak diplidkan di dalam penyataan pembelaan mereka. Adalah undang-undang matan bahawa defendan kepada tindakan untuk kemungkiran kontrak tidak boleh membangkitkan isu ketiadaan balasan kecuali dia telah membangkitkan isu tersebut dalam penyataan pembelaannya (lihat perenggan 15).

(2) Mahkamah Tinggi juga telah menolak isu bahawa responden pertama telah membatalkan perjanjian atas alasan-alasan bahawa ini tidak diplidkan di dalam penyataan pembelaan. Didapati bahawa oleh sebab isu untuk pembatalan tidak dibangkitkan di dalam penyataan pembelaan perayu-perayu hakim Mahkamah Tinggi adalah betul dalam menolak hujahan responden-responden atas isu ini. Pernyataan yang tidak jelas di dalam penyataan pembelaan tidak boleh disandarkan oleh perayu-perayu untuk menghujah bahawa isu pembatalan telah diplidkan di dalam penyataan pembelaan. Walau bagaimanapun, selepas membuat penilaian kandungan kedua-dua surat yang dikeluarkan oleh responden pertama didapati bahawa ia tidak boleh membawa kepada pembatalan perjanjian (lihat perenggan 16).

(3) Syarikat responden pertama telah mengemukakan akaun yang diaudit bagi tahun-tahun 1988, 1990 dan 1991 dan auditornya telah, di dalam afidavitnya, mengesahkan kandungan akaun yang diaudit tersebut sebagai benar dan munasabah. Pengerusi responden-responden juga telah menjelaskan bagaimana jumlah RM261,454 seperti yang dituntut dikira. Selanjutnya, pengerusi responden-responden tidak pernah dicabar berkenaan dengan kebenaran dan ketepatan akaun tersebut. Dengan itu didapati bahawa tuntutan responden-responden berkenaan dengan kerugian mereka telah disokong dengan cara yang memuaskan oleh keterangan dokumentar yang boleh dipercayai (lihat perenggan 17–18).]

Notes

For a case on failure to plead defence, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6027.

For cases on damages, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2644–2670.

Cases referred to

Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302, SC (refd)

National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300; [1984] 1 CLJ (Rep) 283, FC (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152; [1990] 1 CLJ (Rep) 330, SC (refd)

Appeal from: Civil Suit No 22–521 of 1991 (High Court, Shah Alam)

T S Lai (Lai & Associates) for the appellants.
Norzidatul Aini bt Mohd Nazri (Aziza Ismail with her) (Ariff & Co) for the respondents.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This is an appeal by the appellants against the decision of Faiza Tamby Chik J given at the High Court of Shah Alam on 20 June 2001. The learned judge gave judgment in favour of the plaintiffs (now, the respondents before us in this appeal) in their civil action against the defendants (now, the appellants before us in this appeal) for breach of contract; and had awarded them damages.

[2] We have on 25 February 2009 dismissed the appeal with costs, and we now give our grounds.

[3] The respondents'/plaintiffs' claim is based on a written agreement entered into by the appellants/defendants and the respondents on 29 October 1990. The respondents' claim against the appellants is that pursuant to cll 3 and 4 of the agreement the first and second appellants are legally obliged to pay them a sum of RM261,454.

[4] The respondents are also claiming that, by reason of cl 8 of the agreement, the first and second appellants are legally obliged to transfer 33,000 shares of Gas Pantai Works Sdn Bhd (that is to say, shares of the first respondent), presently registered in the name of the first and second appellants, to the second respondent at the price of RM1 per share.

[5] It is alleged by the respondents before the High Court that the appellants failed to make the payments as required under cll 3 and 4.

[6] It is also alleged by the respondents that the first and second appellants had failed to transfer the 33,000 shares to the second respondent as required by cl 8.

[7] Clauses 3 and 4 of the agreement state:

(3) GPW debtors as per Annex 1 attached

KC undertake to collect all due and outstanding debts before 31/12/90. Any undue debts will be collected by KC as and when they are due. Any debt (other than Felda, MPPJ and STM) not collected before 31/12/90 or on due date as the case may be will be deemed a loss by GPW for the purpose for computation of loss under para 4. Upon payment of the loss by KC, GPW will assign the debts to KC to enable KC to recover debt by legal action or whatever means KC deems fit.

(4) Any loss (including loss deemed to be incurred in para 3 above and any loss carried forward from 1/4/89 based on audited accounts) suffered by GPW as at 31/12/90 will be borne and paid by KC on or before 28/2/91. For purpose of this para, any overhead incurred by GPW from 1/10/90 will not be considered as GPW's expense.

[8] Clause 8 provides as follows:

(8) 33,000 Shares in GPW

KC will immediately deliver all the share certificates together with duly executed transfers to GPT. The purchase price for the share shall be at par ($1.00 per share) and the amount due to KC will be offset against any amount that may be due by KC.

[9] In the above three clauses, the abbreviation 'KC' refers to the three appellants ('Foo Khoon Chin, Shamsudin Bin Abu Bakar and GPW Engineering Sdn Bhd'); the abbreviation 'GPW' refers to the first respondent ('Gas Pantai Works Sdn Bhd'); and the abbreviation 'GPT' refers to the second respondent ('Gas Pantai Timur Sdn Bhd'). All this is explained by cl 1 of the agreement.

[10] The background facts of the case are given by one En Wan Ariff bin Wan Hamzah ('PW1'). He was at the material time the chairman of both respondents. They are as follows. The first and second appellants were, at the material time, officers of the first respondent company. What had happened was that the first respondent discovered that it was incurring losses due to the activities of the first and second appellants. It was discovered that the first and second appellants had given credits loosely to customers of the first respondent; and, besides that, had secretly established a company, that is, the third appellant/third defendant, with the first and second appellants being the directors of that company. The third appellant company was originally named 'GPW Engineering Sdn Bhd'. This name (GPW Engineering Sdn Bhd), however, was deliberately chosen by the first and second appellants to confuse members of the public as the first respondent/first plaintiff was also commonly known to the public as 'GPW'. When the incorporation of the third appellant was discovered by the first respondent, the first and second appellants tendered

their resignation as officers of the first respondent on 15 October 1990. Thereafter, on 29 October 1990 the parties entered into the agreement as mentioned above.

[11] When the establishment of GPW Engineering Sdn Bhd was discovered by the first respondent, the appellants, upon being required by the first respondent, agreed to change the name of the third appellant from 'GPW Engineering Sdn Bhd' to some other name, which name would not be similar to either the name of the first respondent or the name of the second respondent. This agreement was incorporated in the written agreement of 29 October in the form of cl 7. Subsequently the name of the third appellant was changed from 'GPW Engineering Sdn Bhd to 'PEM Engineering Sdn Bhd'.

[12] Under cl 3 of the agreement, the appellants agree to collect all due and outstanding debts of the first respondent as listed in annex 1 of the agreement. Under the same clause, it is also agreed that any debt not collected before 31 December 1990 or on the due date, as the case may be, will be deemed to be a loss to the first respondent. If the appellants did not collect the debts by the said date, they must pay the first respondent a sum equivalent to the amount of debt not collected. The first respondent will then assign the debts to the appellants to enable the latter to collect the debts.

[13] Under cl 4 of the agreement, it was agreed that any loss incurred, (including any loss deemed to be incurred by virtue of cl 3, and any loss (based on audited accounts) carried forward from 1 April 1989, by the first respondent as at 31 December 1990, will be borne and paid by the appellants on or before 28 February 1991.

[14] PW1, in his evidence, explained that the losses reflected in the audited accounts for 31 December 1990 was RM266,492. The losses incurred before 1 April 1989 (that is, the date before the first appellant become a director of the first respondent) was RM5,038.00. The sum of RM261,454 is derived by deducting the sum of RM5,038 (the losses before the first defendant became a director) from the sum of RM266,492. In summary, the respondents' claim is:

Losses in the audited accounts as at 31 December 1990 RM266,492

minus

Losses in the audited accounts before 1 April 1989 RM5,038

Actual losses to be claimed RM261,454

[15] An argument that is raised by the appellants before us is that the learned High Court judge erred when he failed to consider that there was absence of consideration in the written agreement between the appellants and the

respondents. This argument was also canvassed by appellants before the learned High Court judge. But, the learned judge rejected the argument on the ground that the issue of lack of consideration was not pleaded by the appellants in their statement of defence. With respect, we are in agreement with the learned judge. In our view, a defendant to an action for breach of contract cannot raise the issue of lack of consideration unless he has raised that issue in his statement of defence. In *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300; [1984] 1 CLJ (Rep) 283 George Seah FJ, in delivering the judgment of the Federal Court said (at p 301 (MLJ), p 284 (CLJ)):

> We have examined the specimen forms of statement of claim based on agreements not under seal in Bullen & Leake's Precedents and Atkin's Court Forms and we are unable to find anything to indicate that 'consideration' ought to be pleaded specifically. *On the other hand, if the defence is to be based on 'no consideration' or 'a failure of consideration' then the specimen forms show clearly that such a defence should be expressly pleaded* (see O 18 r 11).
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> (Emphasis added.)

[16] Another issue raised before us by the appellants is that the first respondent had revoked the agreement by reason of two letters that it had issued. The first letter is the first respondent's letter to the first and second appellants dated 22 December 1990. The second letter is the first respondent's letter of 1 December 1990 to one of its customers, a company known as Multi-flow Engineering Sdn Bhd. This issue was also canvassed by the appellants before the High Court but was also dismissed on the ground that it was not pleaded in the statement of defence. We are of the view that the learned judge was correct in rejecting the appellants' argument. Just as in the case of the earlier issue, this issue of revocation was also not raised in the statement of defence (see *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 (SC); and *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152; [1990] 1 CLJ (Rep) 330 (SC)). What we do note, however, is that there is a vague averment in para 4 of the statement of defence to the effect:

> 4. Secara alternatifnya, sekiranya didapati bahawa perjanjian tersebut adalah sah (dan ini dinafikan), adalah menjadi pertikaian Defendan-defendan bahawa oleh sebab Plaintif telah memungkirkan perjanjian tersebut dan kemungkiran telah diterima oleh Defendan-defendan, maka Perjanjian tersebut tidak sah lagi.

[17] What we observe from the above pleading is that, firstly, what is being alleged is not 'revocation' of the agreement, but a 'breach' (memungkirkan) of the agreement. Secondly, it is not elaborated in the paragraph in what manner the alleged 'breach' was committed. With respect, we do not think that para 4 can be relied upon by the appellants to contend that the issue of revocation had been pleaded in the statement of defence. In any case we have examined the

contents of the two letters and in our view it is far-fetched for the appellants to assert that the letters amount to a revocation of the agreement of 29 October.

[18] Another issue raised by the appellants in this appeal is that the respondents had failed to prove before the High Court judge that they had incurred a loss of RM261,454 with interest as claimed in the statement of claim. In our judgment, how this loss came about had been adequately explained and proved before the trial judge. PW1, in his evidence, had explained that the losses had been shown in the audited accounts for 1988, 1990, 1991, and 1997. Theses audited accounts were tendered by PW1 at the trial, and their admissibility were never objected to by the appellants; and hence they have been marked as exhs P3, P2, P4 and P5, respectively. The losses as shown by exh P2 amount to RM266,492. We have pointed out earlier how the sum of RM261,454, as is now claimed by the respondents in their action against the appellants, is derived. In this regard, we further note that at the trial the respondents had, through PW1, introduced an affidavit of an auditor, one En Ab Halim bin Mohyiddin ('a registered accountant') affirmed on 23 October1997. The tendering of this affidavit was not objected to by the appellants at the trial, and it was accordingly marked as exh P7. En Halim, in his affidavit ('exh P7'), confirmed that all the contents of the audited accounts of the first respondent from 1988 to 1991, as exhibited in his affidavit, were true and fair. At the trial, PW1, when cross-examined by the appellants' counsel, was never challenged as to the truth and accuracy of the accounts; nor as to the correctness of the respondents' understanding of the same. In fact he was not cross-examined at all on the accounts. We are, therefore, satisfied that the respondents' claim as to their losses is satisfactorily supported by credible documentary evidence. It is also significant to note that in this appeal the issue of the admissibility, accuracy or the correctness of the respondents' interpretation of exhs P2, P3, P4, P5 and P7 are not specifically raised in the memorandum of appeal.

[19] With regard to the claim for the 33,000 shares in Gas Pantai Works Sdn Bhd, this claim by the respondents is not denied by the appellants at the trial. Indeed, during cross-examination, both the first and second appellants admitted that the shares have not been delivered and transferred to the second respondent.

[20] In this appeal before us there are other issues raised by the learned counsel for the appellants in his submissions. However, we do not propose to deal with them as they are not set out in the memorandum of appeal.

Appeal dismissed with costs.

Reported by Kohila Nesan